No. 20448

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REUBEN G. LENSKE, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

APPELLANT'S REPLY BRIEF

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from

ORDERS OF

THE UNITED STATES DISTRICT COURT

for the

DISTRICT OF OREGON

Reuben G. Lenske
Attorney pro se
1014 S.W. Second Avenue
Portland, Oregon

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ABBREVIATIONS

My Opening Brief in this proceeding is Op br

The Government's Answering Brief in this proceeding is Ans br

The Clerk's record in this proceeding is CR

When I designate any reference to the main case I add 19539

I numbered the Judge Carter trial phase reporter's volumes in consecutive, chronological order, up to 59 in 19539 and I give the date as well as Volume number.

The August 13, 1965 hearing on motion for new trial is numbered Vol. 60.

20448

APPELLANT'S REPLY BRIEF

RE

ORDERS ENTERED AUGUST 13, 1965

DENYING PREJUDICE AND MOTION FOR NEW TRIAL

Specification of Error 1

Bias and Prejudice

Opening Brief 7 - 12 Affidavit - CR 61-80

Answering Brief 3 - 6

The law is clear that an affidavit of prejudice must be taken as true by the court and the court so announced from the bench: 8/13/65 Vol. 60, page 2:

> "As I understand the law, the Judge cannot, against the evidence, pass on the veracity of the charges made. He may, however, pass upon the legal sufficiency of the motion."

In its first paragraph (Ans Br 3), the Government disputes the facts, while not denying the law. I accept the above statement of the law.

In the bottom paragraph on page 3 the prosecution alludes to the net worth the court found for me and the fact that I did not file an affidavit of indigency. In my motion to proceed with the existing transcript on file in this court in 19539 I set forth that the Government had tied up substantially all of my equities, which meant substantially all of my assets and that I was beseeched with lawsuits and foreclosures that I could not meet.

I expect not to be a pauper because I expect to prevail both in the criminal case and the civil case. In the meantime the Government has me tied up financially and has refused to release its liens on any of the properties liened by it. The prosecution is well aware of my financial status and should not flaunt its 1958 figures or my unwillingness to be designated a pauper.

The prosecution refers on page 4 to my "efforts to use the clerk's copy of the transcript without paying reporter's charges." My affidavit of September 17, 1964, on file in the court in support of my motion of that date states that I paid the reporters about $4000 for my transcript and that they have not requested any additional money from me. My affidavit (C) says that what the trial judge contends for would entail an additional $2500 which I was unable to pay.

JUDGE CARTER ACTED AS AN ADVOCATE OUTSIDE OF HIS JUDICIAL CAPACITY IN THE CIRCUIT COURT AGAINST ME.

My first point (Op br 62/64) sets forth the conduct of Judge Carter in keeping possession of 18 volumes of the transcript in violation of Sec. 28 USCA, Sec. 753, which requires them to be delivered to the clerk. This is a mandatory requirement and is as binding on the Court as it is on the reporter. Had this been an oversight it would be excusable and not a basis for prejudice, but in the light of the succeeding paragraphs on page 62 (CR) such retention would show prejudice, even though Judge Carter might be construed to be acting in a judicial capacity after the appeal in retaining the transcripts.

In writing the letters to the District Court Clerk and to the Clerk of the Court of Appeals, Judge Carter was not acting in a judicial capacity. Here he is acting as an advocate against me and for his reporter, although, as I set forth in my affidavit, no request for money came to me from any of the reporters as a condition to filing the certified copy in the District Court or for its use in the Court of Appeals. Clearly the failure to file in the District Court is a violation of 28 USC Sec. 753.

If Judge Carter was acting in a judicial capacity in holding the 18 transcripts of proceedings that occurred before him he should have ruled on my motion filed in September, 1964.

In the letter to the District Court Clerk of October 2, 1964 (Cr 77) Judge Carter acknowledges possession of the transcripts and states that he is forwarding the first 40 volumes to the Court of Appeals and retaining the succeeding 18 volumes until he hears further in the matter. In his letter of the same date to the Clerk of the Circuit Court (CR 78) he cites a civil case as authority to require me to pay money to enable the Circuit Court to use the transcript originally filed in the District Court. I believe this would be a violation of due process but the gravamen of Judge Carter's action is enhanced in his admonishing the Circuit Court Clerk not to file or make a part of his records, the 40 volumes sent him. Judge Carter has no jurisdiction over the Circuit Court Clerk and that letter constitutes an intervention against me or my interest, and on behalf of someone

close to him, i.e., his reporter, in a matter of financial interest to his reporter.

In his letter of October 15, 1964 (CR 80) Judge Carte advocacy against me and for his reporter heightens. In tha letter he cites two cases, whereas originally he cited one, in effect, confirms his advocacy when he says:

> "I understand that Lenske is making application to the Circuit for the use of the clerk's copy. I accordingly request that a copy of this letter be handed to each of the judges on the panel."

Here Judge Carter, although acting as an advocate agai me and for his reporter, places the full weight of his judic prestige before the Circuit Court of Appeals in the form of letter including citations and reasons against my interest.

From this point on Judge Carter should no longer sit c any judicial issues involving me. From this point on perso bias does exist. From this point on I was justified legally my belief that I could not have a fair hearing before him. Leaving aside the fact that Judge Carter sat on my motion fc new trial from February 15, 1964 for almost three months wit apparently taking cognizance of it and then, after remand wa until August 4, 1964 before setting it for hearing, could I anything but believe that Judge Carter's advocacy of what I consider a penalty against me for exercising the right of ap to the advantage of a person so close to him as his own rep reduced my chances by 95% to prevail on the merits before hi

It is my belief that the demands of due process dict

the removal of Judge Carter from the hearing which could have freed me.

PREJUDICE AS DEMONSTRATED IN MY BRIEF, 19539, AND CONDONATION OF AGENTS' STEALING OF MY DOCUMENTS.

The reading of my brief in 19539 and the testimony of Albert Deschenes, George Nyman and Frances Slossar will fortify points 2 and 3, CR 63, which are referred to on page 4, Ans. br.

JUDGE CARTER'S RESENTMENT AT MY DESIRE TO ARGUE MY CASE.

This is set forth in CR 63-4 and Ans br 4-5. On February 28, 1964, after a full day's session in court, and a night session reaching to 9 P.M. (Vol.57 2/28/64 2548) my co-counsel, Charles Burdell of Seattle, Washington said, "I don't feel I can properly argue it tonight at this time," and it would take at least three hours to argue the defense side and I would like to have a continuance until any date - Monday... when we are more equipped to do it." (Vol. 57 2/28/64 2549). The response was immediate, "THE COURT: Motion denied." And (Vol. 57 2/28/64 2550) "THE COURT: ... we will proceed with the argument." Mr. Burdell argued for a comparatively short time (Vol. 57 2/28/64 2552 - 2588 and then the following occurred: (Vol. 57 2/28/64 2588).

MR. LENSKE: If it please the Court --

THE COURT: I don't have to hear you. You have an attorney. I ha been patient throughout this trial. I have let you talk and argue and in an ordinary case if you are represented by Counsel your Counsel does your talking.

MR. LENSKE: If it please the Court, I didn't absolve myself as

co-counsel. Two-thirds of the trial I did entirely myself as Counsel and as to that portion of it, I, alone, can argu relating to it.

THE COURT: (Vol.57 2/28/64 2589) I don't propose to hear argument from you, and I don't think it is particularly see you to be arguing on the question of your own alleged fraud intent to evade taxes.

MR. LENSKE: I do want to argue the case to the best of my including intent and including my motion to acquit...

THE COURT: (Vol.57 2/28/64 2591) I will give you thirty m

This was, as the prosecution states on page 5 of its approximately 11:00 P.M.

An unprejudiced judge would have wanted to hear me f and would have set a time other than 11P.M. and would have aware that I had tried two-thirds of the case myself. Furth it was not unseemly for Clarence Darrow to try his own case co-counsel and to present argument to a jury himself. Leav aside the matter of competence, certainly it is neither "un nor wrong for a person to present argument on all phases of case. And again in April:

MR. BURDELL: (Vol.59 4/22/64 2846) The point is tha Lenske has, all the way through this trial from the very be up to the present time, been acting to a substantial degree own attorney.

THE COURT: (Vol. 59 4/22/64 2843) ...And the Court the motion for a new trial.

MR. LENSKE: May it please the Court, I have not com

my statement on the motion for a new trial.

THE COURT: Do you want to say something in your behalf before you are sentenced? We are adjourning at 12:00 o'clock.

. · Yes, Judge Carter threatened to deny me a pre-sentence statement.

THE COURT: It is now twenty-five minutes to 12:00. ...Now if you want to take time now to talk about these matters, you may. Otherwise, I would rather hear you on what you would have to say as to the matter of sentence.

Also, the motion for admission of exhibits, which was filed April 15, is denied. I think I heretofore ruled on that -- refused to consider them.

THE COURT: (Vol. 59 4/22/64 2847) ...You may have twenty minutes. You may have until 12:15, if you want. You may have thirty minutes if you can divide it with Mr. Burdell..

JUDGE CARTER LISTENED AVIDLY TO THE OBYE-DURKIN ADJUSTMENT ISSUE SO LONG AS IT APPEARED THAT IT MIGHT BE ADVERSE TO ME. WHEN IT APPEARED THAT A MAJOR ITEM INVOLVED MIGHT BE FAVORABLE TO MY NET WORTH JUDGE CARTER STRUCK THE EVIDENCE.

References - CR 70-71, Ans. br. 506

Appellant's Opening Brief, 19539
Ex 3020, 3021, 3022, 3023, 3024
Ex Z-3, R-3
CR 732, 791, 19539
8/15/63 Vol. 51 1700-1725
8/16/63 Vol. 52 1876-1901

In December,1953 a deed (Ex Z-3, Vol. 52, 8/16/63, 1
was executed to me for an undivided half interest in the in
of Maxine Durkin in two parcels of real property. The appr
value and the market value of one piece, designated as the
Avenue property, which was income bearing, was $50,000. Th
of the portion conveyed to me was $12,500. (R-3) The incom
this property (Vol. 51,8/15/63,1702) was collected by me in
and was disbursed in January, 1959 as follows: one-half to
Shriner's Hospital for Crippled Children, the owner of a ha
interest, one quarter to Maxine Durkin and one quarter to I
Spiegel and Spiegel, my then law partnership. I was subjec
to considerable cross-examination and my file on the matter
marked as an exhibit and was examined by the prosecution du
the noon recess.

When it appeared that some suspicion might be cast u
on account of an apparent erasure on a deed the court was
interested in the whole transaction and it was gone into ve
thoroughly. However, when it appeared that the apparent er
no significance and it also appeared that the conveyance o
Union Avenue property was to myself personally and was in
and that there was nothing untoward whatsoever in my relati
to the transaction, Judge Carter struck all the evidence e
the item relating to the income of $837.59 from the propert
which he later allowed me as a proper deduction from 1958
because of my liability for that amount as trust monies pa
to the distributees, including the Lenske, Spiegel & Spieg

partnership for the one fourth portion.

It did not dawn on me until later why the Prosecutor, Mr. Alexander, was willing to concede to the striking of the testimony and why Judge Carter chose to strike it on his own motion

Since the conveyance was to me in 1953 and since the sale of the property in 1958 showed on our partnership records as a sale by the partnership for $12,500 and since the beginning net worth period was December 31, 1954, I had a beginning net worth on that date of an additional $12,500, which was distributed in 1958 to my partnership, and I was therefore entitled to a deduction of $12,500 from my 1958 net worth plus depreciation allowance for the intervening years. This did not dawn on me till later and when I tried to revive the transaction, Judge Carter refused to consider it.

Note - I made another mistake. In my motion (CR 791) and my brief, 19539, 43, I claimed only two thirds of the $12,500 or $8,333.33. This was error. My third was already accounted for in the partnership income and, therefore, the whole $12,500 was properly deductible from my 1958 net worth.

Why, except for prejudice, would the court permit hammer and tongs after me when there was suspicion of wrongdoing or objection to my being allowed the $837.59 reduction, and then the hurried burial of the transaction when I should be allowed a reduction of sufficient to knock out 1958?

Following are pertinent excerpts from the record.
Vol. 52,8/16/63, 1894.

MR. ALEXANDER: We will bring out that the Union Av property, when they collected this fee in 1958, was record fee on the partnership books and records, and the entry is record fee, Union Avenue property. That is the only prope was reported by the partnership and the only property that ever reported as income...And I don't know what this piece is that is dated 1953.

THE COURT: (page 1895) You (to Alexander) spoke o as a piece of paper.

MR. ALEXANDER: Which is that?

THE COURT: Exhibit Z-3 (2), the unacknowledged dee No. (2) is the affidavit. Z-3 (1) is the deed of December This was in the possession of the defendant.

THE COURT: Obviously, it was delivered, whether ac or not, and it conveys title.

THE COURT: It conveys title. The recording statut have to deal with bona fide purchasers for value.

THE COURT: (page 1897) And the signature on (2) c and a layman could see it is the same signature as appears which the witness says is now in the possession of the tit company and could be obtained...

MR. ALEXANDER: (page 1898) ...We are going to deve testimony ...that the entry for this whole transaction of Durkin estate in the partnership books is in 1958, when th collected the fee, and it was reported as taxable income i that year and correctly so.

MR. ALEXANDER: May I take the defendant's file, yo and examine it during the noon recess?

THE COURT: Yes, it is marked for identification...

After the noon recess the following occurred 8/16/6

AFTERNOON SESSION

1:30 o'clock p.m.

THE COURT: Defendant present with his counsel.

Gentlemen, I have given some consideration to this matter that you have beengoing into at length. This case was opened up for this further hearing solely for the purpose of considering these adjustments which were submitted through Mr. Marx to the Government and a copy to me, and relying upon that understanding I struck out of the records some testimony Mr. Alexander offered about a certain document and this morning I refused to hear Mr. Hawkins, which pertained to some other issue on a matter on which I have already made findings.

We come down now to an adjustment in the Obye Estate which involves, as far as rental is concerned, some $837. That I will consider -- without indicating what I think about the merits of the adjustment.

But the matter you are now going into will not affect the rental adjustment and would, if it affects the case at all, amount to some adjustment proposed by the Government that would not vary the rent situation, but would pertain to net worth as another type of adjustment.

Although they say it is pretty hard to unring a bell, that is what I propose to do. I propose to set aside my order admitting into evidence Exhibits 3021, 3022, 3033, 3034, and Z-3 (1); to strike the testimony of Mr. Lenske insofar as it involves these

exhibits that had been stricken; and not to admit into evid
Exhibit Z-3 (2), Z-3 (3).

Is the record clear now as to what I am doing?

MR. ALEXANDER: Yes, Your Honor, that reflects the a
of counsel -- I am sorry, it reflects the Court's ruling on
matter.

THE COURT: What is that?

MR. BURDELL: As I understand it, what the Court sai
properly reflects the Court's view on it.

Please note that the Government says (CR 791) that "The testimony was stricken by the Court following the agre of counsel." Mr. Alexander did agree to it as per his stat above, but I did not permit my counsel to agree to it and th accounts for the colloquy quoted above from page 1901, Vol. 8/16/63.

Please note further that the Government does not see fit to present any meritorious basis for rejection of this n in my net worth. It could have, as an alternative to its co defense to this item, argued the merits but it did not. As i most all of its defenses to my motion for new trial the Gove has resorted to technical defenses and has ignored the merit The same is true of numerous other items, such as the Norman item, which would have eliminated 1957 and/or 1958. (Br 19539, page 61) The Gov ment did not contend that I ever got a penny back from the m I invested in or with the Wilson family, totalling in the ar of $15,000; I ask the Court to look at the substance and gr

me justice on the merits.

NO KNOWING OR AUTHORIZED CONCESSION

On February 28, 1964, Vol. 55, 2435, the following occurred:

THE COURT: Before we take up the W-3 series, let's just run through the record. No. 1 is in dispute; 2, 3 and 4 are conceded and have no effect upon the Exhibits 3030 to 3033 and have already taken them into account. Is that right?

MR. ALEXANDER: That is correct, your Honor.

THE COURT: Is that right?

MR. MARX: Yes, sir.

I had never authorized Mr. Marx to make any concessions on my behalf and I did not know what they were talking about. The concessions appeared to be concessions by the Government since Exhibits 3030 to 3033 "have already taken them into account."

I have gone into this Obye-Durkin item at length because I believe that at some time the court's prejudice got the best of him and closed his mind or eyes to this important item and, therefore, my affidavit of prejudice was well founded on it.

But that is not the only reason I have gone into it at length. To avoid duplication I ascribe this portion of the brief to cover theObye-Durkin item for my reply brief in 19539. It is the second item on page 3 of the subject index and on page 43 of that brief. I further ask the court to read the transcripts covering that item and the motion on CR 732 and CR 791 and then reverse Count III, the year 1958, on account of plain and obvious error regardless of any technicalities. Not until I wrote this brief did I realize the full effect of this item.

I was mistaken in my motion, CR 732 and my brief in 19539 in asking for an adjustment of $8333.33, which is two t of $12,500. The whole $12,500 was accounted for in our part return for 1958 and already is reflected in my 1958 income. Therefore, the whole $12,500 should be deducted from my 195 net worth. However, if it were calculated that I only had third interest in 1953 when I got the deed, then one third f the $12,500 should be deducted from 1958 income, or $4,166.6 almost half of the amount necessary to wipe out 1958 after crediting me with the amount of tax paid that year. But I firmly believe that I am entitled to the whole $12,500.

There is another reason why this reduction should be allowed me. Under the doctrine of the Holland case, where Government has a lead and has not followed it up, at the le the item should be conceded to reduce the taxpayer's net wo There were ample leads in the partnership books leading to Obye estate file, and other court records showing when the ment agreement was made for division of the estate in 1953 resulted in the deed from the Durkins to me.

I ask the court to read the testimony on this item a how prejudicial and erroneous it was for the court to strik evidence when it had reached the trail of a major reduction my net worth for a crucial year, the only year in which it necessary to reduce income by more than $4000 to eliminate deficiency.

THE GOVERNMENT AND THE COURT BASED THEIR CONCLUSION ON THE BERTRAND ITEM ON "NO EVIDENCE" AND UNWARRANTED JUDICIAL DESTRUCTION OF INCONTROVERTIBLE EVIDENCE.

The Government bases its whole case on the $3911.12 Bertrand check on the "no evidence" doctrine. That I received the money is conclusive. The check is in evidence, its deposit in my account is in evidence. (S-1) Mrs. Bertrand testified that she gave it to me, I testified that I received it. The Government seems to think it made out its case against me by showing that the $3911.12 receipt does not appear on my black ledger book and that it has not found a descriptive memorandum in S-1 along with the deposit slip showing the deposit in my bank account. By the same token there is no slip showing this was an attorney fee deposit and no entry in my book or the partnership books showing that this was a fee. I invite the Government to file with the Court any refuting evidence to the foregoing.

Thus the Government bases its conviction of me on "no evidence", i.e. because somehow an office girl failed to make an entry in a book showing the receipt of a substantial sum of money. Does that mean that I didn't receive the money? Does that mean that the cancelled check and the deposit of the money in my bank account are not conclusive evidence that I did receive the money?

Since the ledgers and the deposit slips do not show that sum of $3911.12 paid me covers there simply is no book evidence on those scores to show the consideration for that But we have two witnesses, Eleanor Bertrand and myself, alo the original statement and my copy of the statement and Ele Bertrand's check stub. As to the possibility of it being a attorney fee, there is not the slightest evidence that I pe services of that value, that I ever asked her for that amou of money for fees or that I made a statement to her for suc fees or any other fees or that she paid me that check in the of $3911.12 for fees.

The Government's case is based upon "no evidence". M based on concrete, irrefuted evidence. The unrepaid advanc me, evidenced by checks, material purchases, advancements to labor and our sworn statements to the judge and jury in ope court that the $3911.12 check was given to me in repayment advances. No unprejudiced judge can constitutionally, by t use of "no evidence" and the destruction of clear affirmati evidence, convict a man of a crime as Judge Carter did to m on Count II for 1957. He did that in the face of the four cardinal principles of law that:

1. A scintilla of evidence is insufficient to prove a fact.

2. Proof of a fact must be supported by substantial evidence.

3. The Government has the burden of proof.

4. The Government must prove every phase of its case beyond a reasonable doubt.

In view of the fact that an important feature of this case is the constitutional issues, i.e., due process and unlawful search and seizure, and the issue of due process includes the issue of Government prepared false statements and Government sponsored false testimony, it is the duty of the appellate court to examine carefully the evidence in this case, on the facts, (involving due processand this is one of them) and to form its independent conclusion on the facts.

THE TWENTY-FIVE HUNDRED DOLLAR BERTRAND MORTGAGE TO ME AND THE EVENTS THAT FOLLOWED IT ALSO PROVE THE RIDICULOUSNESS OF THE COURT'S FINDING.

The prosecution makes a point of the fact THAT Eleanor Bertrand is a widow and that I have a mortgage on her home (Ans. br. 20448,23.) What an amazingly distorted view of evidence! The mortgage given to me on her home is a third mortgage, given in December, 1958. It is non-interest bearing and at the time Eleanor Bertrand testified not one penny had been paid on it.

The court's finding was that in December, 1958 she owed me about $5400. almost $3000 more than the amount of the mortgage. Here again is Government and Court manufactured evidence. If I took the security for my benefit and she owed me $5400, is it reasonable that the mortgage would be for that amount? If I took it for protection for her, so that she would better insure her exemption rights in case of bankruptcy or execution sale, wouldn't it have been foolish to execute a mortgage for $2500 if there were $5400 owing? Here again, as in so many other phases of the case, the findings are based on no evidence or contrary to evidence.

Evidence of succeeding events proved conclusively that the mortgage was for future legal services and that the sum

$2500 was as large a sum as I felt I could sustain in case of litigation over it and that it was for the protection of Eleanor Bertrand.

Her bankruptcy schedules (CR 106,109, 20448) show only $2500 indebtedness to me and the consideration to be legal services. The evidence further shows that the services anticipated at the time of execution materialized accordingly. She was sued for over $10,000 and upon trial judgment was rendered against her. With the three mortgages against her home, the homestead exemption, a very limited exemption in Oregon, now $7500, then only $5000, was allowed, and she retained her home. What was there to counteract all this evidence? "No evidence."

ELEANOR BERTRAND - ONE OF THE MANY REASONS WHY I DID NOT CALL CHARACTER WITNESSES.

I would like the court to judge me as a person, a lawyer, a lender on the basis of my treatment of the Bertrand family. This is an example of why I did not call character witnesses. If I mistreated that family, if I hadn't kept my word with them, if I overreached them (collecting $3911.12 in fees from them would have been overreaching them and would never have resulted in Eleanor Bertrand's writing Ex G-3, (CR-9), the letter of April 9, 1961, without my knowledge to Deschenes when he inquired about her relationship to me), if Ihad charged them excessive interest for the loans(I charged none), then I would have needed character witnesse

But it was obvious to me that my best character witn
were the people I dealt with, the people I represented, and
Government called 347 of them and they, I am proud to say, with t
exception of a handful, including Eleanor Bertrand, weather
the feat of Government pressure, and attested to my fair de
with them.

I have gone to considerable length to make my point
but I burn when the Government makes another point on no ev
My mortgage was no cause for concern of Eleanor Bertrand, a
mortgage that was non-interest bearing and on which not a p
had been paid from 1958 to 1963. What the prosecution, bou
by law to see that justice is done, failed to point out is
Eleanor Bertrand did have good cause to fear the Government,
at least Albert Deschenes (CR 7).

Yes, I hope the court will judge me by the standard
set in my treatment of the Bertrands. I hope the court wil
treat this case by that standard. The "no evidence" of the
Government against the overwhelming evidence, documentary a
live. I hope the appellate court will see the real pattern
case when it puts together the false, Government prepared
Eleanor Bertrand and Rebecca Tarlow affidavits and the Gove
sponsored false testimony of Mary Jane Garson, W. K. Royal
Madelyn Cox, and the jail threats against Jake Preuit and
Melvin Davis.

April 9, 1961

Internal Revenue Service
P.O. Box 5341
Portland, Oregon

Attention: Mr. Albert Deschenes, Special Agent

Gentlemen:

In accordance with your telephoned request to me a few days ago, I write this letter to state that all business matters were handled by my husband in years past and Mr. Lenske was his attorney, helping him considerably in legal matters and also advancing money on many occasions for equipment and to build. To the best of my knowledge these loans were repaid.

The mortgage I gave Mr. Lenske was at a time when my husband's whereabouts were unknown, I was being threatened with lawsuits, and I needed to protect my equity in our home. It was understood that the mortgage would stand for any services he might render for me in the future also and while he has done considerable work for me, I have never received a bill from him. I therefore don't know how much I owe him at this time but hope to start taking care of this either this year or next.

I am a widow with two children and Mr. Lenske has helped me immeasurably, thus far without remuneration. I trust this answers your inquiry.

Sincerely,

Mrs. Eleanor W. Bertrand

R.2, Box 225
Aurora, Oregon

Government Sponsored False Testimony

Madelyn C (Pavia)(Ryland) Cox

References:

First testimony - 2/25/63, Vol. 4, pages 52-56

Second testimony - 3/27/63, Vol. 25, pages 3-22

CR 19539, pages 200-215

Ex 2034, receipt

Ex 195, folder 43, Contract of sale, Allens to Madelyn Pavia (Cox) for 6628 S.E. 43d

Ex L - letter of Nov. 12, 1953 by Madelyn Ryland (Cox) to Mr. and Mrs. Ralph Coates

Ex N - lease of said house, Madelyn Pavia (Cox) to Coates

Ex O - undated letter, Jackie (Madelyn) to Reuben Lenske

Ex P - letter by Madelyn Ryland (Cox) to Reuben Lenske

Ex Q for Identification - copy of letter dated January 20, 1954 to Madelyn Ryland (Cox) from Reuben Lenske

Ex R for Identification - copy of letter dated March 19, 1954 to Jackie Ryland from Reuben Lenske

Ex S for Identification - envelope to Reuben Lenske by Madelyn Ryland

Ex T for Identification - undated letter to Reuben Lenske postmarked December 3, 1953 from Madelyn (Cox)

Ex M - Loan security agreement, Joseph and Madelyn C. Ryland
3/27/63, Vol. 25, page 10

"Agreement. Joseph and Madelyn C. Ryland, husband and wife, have this date borrowed from Kenneth Armstrong the sum of $500, and agreed to repay the same with six per cent interest in two installments, $250 in 60 days from da the balance 60 days thereafter. As security, the Rylands hereby assign the contract of purchase of the property at 6628 S.E. 43rd Avenue, Portland, Oregon. Dated this 11th day of November, 1953. Signed Joseph R. Ryland, Madelyn Ryla

Note - Kenneth Armstrong is an investor for whom I had invested a total of up to $30,000 on property. See 3//1/63 Vol. 8, pages 2-19.

Excerpts - Kenneth Armstrong Testimony

3/1/63 Vol. 8, pages 2-19

Q (By Alexander) ...state your name and address, sir?

A Kenneth A. Armstrong, 1902 G Street Northwest, Washington 6, D.C.

Q Are you familiar with the defendant Reuben Lenske, Mr. Armstrong?

A Yes. I have known Mr. Lenske, I think, over thirty years.

Q Have you had the occasion to invest moneys with Mr. Lenske?

A Yes.

Q In return for this money, sir, what did you receive from Mr. Lenske?

A I received this memorandum agreement from Mr. Lenske.

Q (page 4) Is that (Ex 2091)dated...March 23, 1947?

A Yes.

Q (page 5) This agreement provides, does it not, that you are investing moneys with Mr. Lenske in return for interest on your money; is that right, sir?

A Well, that is correct, in substance. I made him my investing agent.

Q (page 5 line 23) ...How much do you have invested at the present time, sir?

A $30,000.

Q And over the years,(page 15)sir, you received a large number of mortgages which you held as security for your investment; is that right, sir?

A I received some mortgages and other legal papers.

A (To cross-examination, page 17, line 8) ... I was admitted to practice law in the State of Oregon on September 12, 1921 and ever since that time I have been and still am a member of the Oregon Bar in good standing... (line 12) I am employed as an adjudicator in the Adjudication Division, Veterans Benefit Office, Veterans Administration, Washington, D. C.

Madelyn Cox False Testimony

Madelyn Cox, then Madelyn Pavia, purchased a house on contract in the year 1953 (Ex 195 f 43). Ten years later, 1963, two witnesses testified falsely about this property transaction, Madelyn (Pavia)(Ryland) Cox and W. K. Royal. Each of these Government witnesses testified as to oral admissions against me relating to the ownership of the vendee's interest in the property covered by that contract, oral admissions presumably made some nine or ten years previously. 2/25/63 Vol. 4, 52-56 and CR 20448, 33.

Madelyn Cox testified Vol. 4, 2/25/63, 55:

Q (By Alexander) Now, after you made the payments about three months, what did you do next, if anything, with respect to this property?

A I borrowed $500 from Mr. Lenske.

* Q Well, when you borrowed the $500, did you continue
* to make the payments on the contract after that?
*
* A No, because he told me it was his house then, that)
* I signed the house over to him.)

Q And did you leave the city at that time?

A Yes, I did. I went to San Francisco.

Madelyn Ryland and her then husband borrowed the money and assigned the contract on November 11, 1953 (Vol. 25, 3/27/63, 10). In the following month, December, 1953, Madelyn Ryland (Cox) wrote me (CR 204, 19539):

"I would like to sell that house..."

After I served copies of this letter and other correspondence between herself and myself on the prosecution and after she was again interviewed by them and was recalled for further cros-

examination (CR 200-215, 19539 and Vol. 25, 3/27/63, 3-22)

I confronted her with her testimony of 2/25/63, Vol. 4, 44:

Q (By Alexander) Well, when you borrowed the $500, did you continue to make the payments on the contract after that?

A No, because he told me it was his house then, that I signed the house over to him.

Then I asked a question and received the following answer to it:

Q ... Is that statement true? Did I tell you it was my house then? (3/27/63, Vol. 25 page 9)

A No, you didn't say it in those words, Mr. Lenske. When I didn't pay you the $500, it was your house. You said you never wanted it, but I never owned it, so I don't know who had it.

We now have the truth from her, i.e., that I didn't tell her that the house was mine and that I said that I never wanted it. But at this second session she lied again. She said (Vol. 25, 3/27/63, 6):

A When I asked you if I still owned that house in one of your letters that you had photographed, you never gave me a definite answer...

She admitted that this communication was in writing.

Q Now, is this statement you made based upon written letters between yourself and myself?

A That is right.

Q It wasn't based upon conversations between us?

A No, because I never talked to you.

In answer to her December, 1953 letter I wrote her on December 12, 1953 (CR 209, 19539) as follows:

> I have your recent letter. I shall try to get a buyer for you for the amount that you want, but I cannot promise that this can be done.

Again I wrote her on January 20, 1954: (CR 210, 19539)

> As I told you before I do not need nor care for the house myself although I have made the advances for you to help you retain it, as well as to protect the loan that I made for you... I will let the money I lent

you ride for the time being so that you can keep your equity in the property.... I am glad to note that you are both employed and I am sure that if you are conservative in your method of living you will be able to keep the equity in the house.

Again I wrote her on March 12, 1964 (CR 212, 19539):

I told you originally and also wrote to you that I do not want the house.

This correspondence dispels Madelyn Cox's first false statement, that I told her the house was mine when she signed the loan agreement and assignment, and her second false statement that I did not give her a definite answer in the correspondence.

Poor Memory or False Memory?

I asked Madelyn Cox some other questions (Vol. 4, 2/25/63

Q Did I draw up a lease for you after you married Joe and between yourself and the new tenant?

A What kind of a lease?

Q A lease on the house.

A If you did I have never seen it...

At the second examination, Vol. 25, 3/27/63, 13, I confronted her with these answers she had given the first time:

Q Did you make those answers?

A Yes, and I still maintain them. I can't remember that long ago, Mr. Lenske.

When I confronted her with the lease (Ex N) and said:

Q ... and ask you to please examine this instrument and see if that is your signature on it?

A Yes, it is.

I later asked her (Vol. 25, 3/27/63, page 16):

Q Were you shown this very lease, a photostatic copy of this lease, by Mr. Alexander or one of his aides this morning?

A Yes.

Madelyn Cox did not hesitate to remember, falsely, the statement that I told her the house was mine when she borrowed $500 and assigned the contract of purchase. She did not hesitate to remember (again falsely) that I never gave her a definite answer in my letter as to ownership of the house. Yet when the chips were down on cross examination she said, Vol.25,3/27/63,13:

A ... I can't remember that long ago, Mr. Lenske.

Previously on cross examination she had said (Vol. 4, 2/25/63, 60):

A (line 5) No, I can't remember.

And again, on line 10:

A ... Like I said, it has been ten years.

And on page 57, same date and volume:

A No, I really don't,it has been too long ago.

Memory, Falsity, Hostility

Referring to a conversation I had with her on February 4, 1963, on which I interrogated her (Vol. 4, 2/25/63, 60-64) Madelyn Cox said (page 64, line 7):

Mr. Lenske, I am going to be honest with you. The morning you and I talked I hadn't slept in about 30 hours, and you could have been talking all morning, and I wouldn't have understood what you were saying, and I still don't.

The Madelyn Pavia Cox property in itself is not a major item on the net worth attributed to me by Albert Deschenes in his net worth statement and in the court's finding that adopted it (CR 1110, 19539, F 43), also CR 1132, i.e., that one item will not be determinative of a deficiency issue. But symbolically it could be determinative of my case. For that reason I have gone to the pains of analyzing this woman's testimony with some degree of care.

Now, why the good memory for falsities to my detriment, admitted poor memory otherwise and unjustified hostility towards

me when the evidence (see the references on the firstpage of this item) shows I did nothing but good for her? She had nothing to gain by her false testimony against me. The answer is that her testimony does not stand alone, the pattern of he false testimony is threaded throughout the jury trial and becomes clear when it is coupled with the false testimony of W. K. Royal which will follow this item and with the fals affidavit prepared by Albert Deschenes for Rebecca Tarlow, the false affidavit prepared for Eleanor Bertrand, the very similar false testimony of Mary Jane Garson, the unconstitut practices of the Internal Revenue Service against me and the additional ones undertaken by the prosecution. Some of the threads of such evidence are thick, many colored and clear, some are subtle and must be viewed through the spectre of th more obvious misdeeds of the Government before, during and at the judgment in this case.

This item is important because it is one of the very fe items of property attributed to me on which I was examined at the trial and therefore it acted as a viewfinder through which te Court saw numerous other parcels of property attributed to m to which I had no title and as to which there was no evidenc of my ownership. I shall treat this further on in this brief, f I discuss the testimony of W. K. Royal about this property..

W. K. Royal, a Portland lawyer, foreclosed the contract of sale of the vendors (Vol. 6, 2/22/63, 207) of the property purchased on contract by Madelyn Pavia Cox (Ex 195, Folder 43).

He testified very much like Madelyn Cox did, that some nine to ten years previously I had said that the contract had been assigned to me(Vol. 6, 2/22/63, 203):

> "and I then got in touch with Mr. Lenske about it and tried to straighten it out, and at that time he told me that the property -- the contract had been assigned to him."

This scintilla of evidence against me was dispelled by my cross examination of Mr. Royal as I shall show when I go further into the ownership of that property. what I want to emphasize now is the falsity of Mr. Royal's testimony - and who sponsored it. On July 29, 1963, in the foreclosure suit in the State Court I examined Mr. Royal regarding this contract and here is the testimony (CR 33, 20448):

Q Well, then, Mr. Royal, you were never able to find out from me what, if any, interest I claimed in the property, is that correct?

A You told me that you had loaned Mrs. Pavia $500, and that was all; that's all that I could get out of it.

Q Then as I understand your testimony, the only information that you received from me regarding any claim of any kind relating to the property, was that I had lent Madelyn Pavia $500?

A I think that was the gist of the whole thing. I tried to pin you down and I couldn't get any response.

Q Do you mean I never told you that I was the owner of her equity in the property?

A You never mentioned that. You never told me that.

Q Do you mean to tell this Court now that I never told you that I was the owner of Madelyn Pavia's interest in the property?

A You never told me of any assignment to you.

There is no denial by the Government that the testimony of Mr. Royal in the State Court showed the falsity of his testimony against me in the U. S. District Court. The real question, therefore, is, how come the original false of an oral admission by me some nine to ten years earlier? How come a similar oral admission by me to Madelyn Cox, both of which were proved to be false by the later admissi under oath by Madelyn Cox and W. K. Royal? Some central i sponsored the two like false statements; the same force th sponsored false affidavits by Rebecca Tarlow and Eleanor I the same force that stole documents from me by the hundred the same force that extracted affidavits from other witne by threats as will be shown later in this brief. The proo of the pattern is evident in the Madelyn Cox and W. K. Ro similar but separate false testimony.

The prosecution does not deny the State Court testimo of W. K. Royal, which should effectively make false the W. Royal ... U. S. District Court testimony that I said the contract had been assigned to me; it merely says my point comes too late (Ans. Br. 30). I acknowledge that I sho have brought this forth earlier but ask that in the inte of the truth and justice the court accept the testimony a shown in CR 33, 20448. If the truth is otherwise let the prosecution refute it even though I served my affidavit c the Government on February 13, 1965, almost a year ago. (CR 20448)

as per following cross examination by me, Vol. 4, 2/25/63, 196:

Q Do you think that Mr. Franklin might have your file of correspondence with me?

A I called him this morning and he was out of the city, and I spoke to his secretary. She said they had nothing that old in their files at the office, but he might have that in his files at some other place where he keeps files, but I was not able to contact him.

And again she said (Vol. 4, 2/25/63, 196, line 21):

A ... It is possible that he (Franklin) still has it.

She also had testified before that (page 188, line 19):

A Well, then the real reason I don't have that letter, I sent everything up to a Mr. Wesley Franklin, an attorney who I knew before I left Portland...

There were two false steps in Mary Jane Garson's testimony. First must be shown the destruction of the correspondence, then the contents of the correspondence. Albert Deschenes knew that she had forwarded the matter to her attorney, Wesley Franklin, since she so advised him when she answered his letter of October 19, 1959 (Ex 2084, F 93). Moreover, she spoke to Government agents a number of times after that (Vol. 23, 3/25/63, 9-12).

Mary Jane Garson showed some contriteness (Vol. 4, 2/25/63, 195), "and I will apologize for my bad memory" and shortly thereafter, "And again I will apologize for my bad memory." Not so the prosecution. When I moved that her false testimony be stricken (CR 193) there was no concurrence by the Government, and this was after I found and produced and served upon it the correspondence that showed up the falsity in black and white. It is therefore evident that the two false steps were induced by the prosecution and we must add the Garson false testimony as one of the links in the chain of false testimony induced, sponsored and adduced by the prosecution.

Mary Jane (Mrs. John E.) Garson

Government Sponsored False Testimony

Property Involved and References:

Pierce property (2646 S.E. 122nd), Folder 93

First testimony - Vol. 4, 2/25/63, 182-198

Second testimony - Vol. 23, 3/25/63, 9-17

Motion to recall her for further examination - CR 193, 19539

Supporting correspondence - CR 193-198, 19539

Letter, Garson to Deschenes, Oct. 19, 1959 - Ex 2084, F 93.

Mary Jane Garson was called as a witness by Mr. Alexande and examined by him (Vol. 4, 2/25/63, 187):

Q You had no discussions in connection with this property or this mortgage with Mr. Lenske, then?

A No discussion, but I received a letter.

Q Do you have that letter with you?

A I don't have anything. I throw everything away.

Q What did Mr. Lenske say to you in that letter, if you remember?

A ... The letter said, stated that he purchased the property.

That she destroyed the letter (or letters) was false and that I wrote her that I had purchased the property was false. See Exhibit I and CR 196, 197, 198, 19539, the letters I wrote to her. The only letter referring to the purchase of the property, CR 198, said:

"My client is considering a trade of the property."

On the very morning she testified that she had destroye the letter she called her attorney in Portland, Mr. Franklin

Rebecca Tarlow

Government Prepared False Testimony

References

My brief, 20448, 68-80

Vol, 20, 3/21/63, 131-141

CR 20448, pages 5, 58a, 58g, 58H, 58I, 58J, 580, 58P

Ap. Answer, CR 97-103

Ap. br. 20448, 21, 24

Ex 2358, F 226

CR 1109, 19539

In my opening brief, 20448 I said on page 70:

"I demand a specific answer to my challenge that the ending balances each year as prepared by Albert Deschenes is false and substantially incorrect."

The Government has refused to meet my challenge. There was no simple or even qualified "no" to my challenge (Ap. br., 20448, 23-25). The Government prosecutors have enough integrity and concern for their standing before this court so that they did not and will not state to this court that:

1. The figures compiled by Deschenes and

2. Accepted by Rebecca Tarlow when she was in the hospital and

3. Accepted in toto by the trial court,

are a correct statement of the annual ending liabilities. But while their self respect will not permit them to make the false statement that those figures are correct, their integrity is short of an admission that the figures are incorrect.

The Government is correct, however, when it states (Ap. br. 24): that at the trial:

"Mrs. Tarlow testified with respect to her affidavit (Ex 2358) reflecting the amounts owed to her by the defendant (Vol. 20, pp. 131-141): 'Yes, that is correct because we went through these very thoroughly at the time.'"

Mrs. Tarlow was led into that false testimony by Mr. Alexander as follows (Vol. 20, 3/21/63, 136-7):

Q Now, does that statement (Ex 2358, Deschenes-prepared affidavit)refresh your recollection as to the amounts you invested with Mr. Lenske?

A Yes.

Q At the end of 1956, did you have $15,500 invested?

A Correct.

Q And at the end of 1958, you had $28,500?

A Yes, that is right.

Rebecca Tarlow sued me in State Court and I took her deposition on June 25, 1964 and she then testified (CR 58-1

Q Did you prepare that (Ex 2358) yourself?

A No.

Q Who prepared it?

A I turned over all my material to Mr. Deschenes, as I said before. I think I mentioned that last time when you were here, and I gave him whatever I had and I said, "Here it is. This is everything I have invested and this is every thing-- I think everything-- what I turned over to him, I gave him my mortgages, the letters pertaining to the mortgages. It was in a little bundle I turned over to him, and he got his record from it.

Q Did you examine that in detail before you signed it?

A No.

A No, he came to me when I was hospitalized afterward and he said that he had an affidavit made as a result of the investigation when he was at my home, as I remember, in other words, maybe to that effect. I can't remember exactly what he said, and he would like to have me sign it and he would write it, and he presented it to me and I looked it over ... as far as the dates ... I paid no attention to that ... being in the

hospital and having no mortgages I didn't even look at them.

A ... he says he needs my signature on this. I believe he must have said that "this is the information I prepared from your material." He must have said that...

Q Did he have this affidavit all prepared when he came to see you?

A Yes.

Q These exhibits are mentioned in the memorandum -- as memoranda in your affidavit, and therefore were already known to Mr. Deschenes, were they not?

A Oh, yes, they were known to Mr. Deschenes.

IT SHOULD BE CLEAR, THEREFORE, THAT THE ENDING LIABILITY BALANCES ON THE PRECEDING PAGE, THOUGH COMING FROM THE MOUTH OF REBECCA TARLOW, EMANATED FROM THE MIND AND PEN OF ALBERT DESCHENES.

So much for how the false balances got into the original testimony of Rebecca Tarlow; now let us see a few specific illustrations of the falsity. Continuing my examination of Rebecca Tarlow on deposition on June 25, 1964, (CR 58-I):

Q ... and then in the year 1956 it (Ex 2358, the Deschenes-prepared affidavit) shows $3,000. Did you invest only $3000 with or through me in the year 1956?

A Let me see. In 1956? No, 1956 I turned over to you a check for $3,000 and for $5,000, in 1956 of March was $3000 and July 13, was $5,000.

Q (CR 58-H) The $5000 that you gave me on July 13, 1956, was that repaid to you?

A No, you didn't pay me in 1956.

The foregoing testimony was fortified and corroborated by the $3,000 and $5000 cancelled checks (CR 58-O). What

effect does the new Rebecca Tarlow testimony have on my net worth for 1956? It simply decreases it by $5000 and that decreases my income for 1956 by $5000 and might, by carrying the loss forward, decrease my 1957 income. Let us now see the effect of this new evidence in specific figures for 1956.

The indictment alleged that I had an adjusted gross income of $564.41 for 1956 (Count IV, CR 19539, 3). It further alleged that my return for 1956 showed a loss of $9940.45. The court found that I had a loss for 1956 of $9231.59 (CR 1[illegible]). The additional decrease of $5000 in my net worth, when added to the court's finding would result in a finding of a $14,231.59 loss for 1956 or $4291.14 greater loss than my return shows. I shall later dwell on the overall effect of this evidence. The Government has not denied the truth of this evidence and the $3000 and $5000 checks to me by Rebecca Tarlow appear in my bank deposits (S-1).

I continued my examination of Rebecca Tarlow on June 25, 1964 that culminated in some additional figures (CR 58-H).

Q Then your present opinion is that as of December 31, 5[illegible] you had outstanding, through me, a total amount of money coming to $39,000?

A That's right, that's the way it seems. That is the way it seems.

Q I now again refer you to Deposition Exhibit No. 1. (E 2[illegible] Does that exhibit show the total amount you had invested wit[illegible] me as of December 31, 1958, was $28,500?

A Yes, it says there. I don't know how it was arrived a[illegible] I think there is some conflict there because of the transfer[illegible] of the checks from above, in 1959, of those mortgages.

I continued to examine Rebecca Tarlow:

Q ... (CR 58-1) then it is a fact that on December 31, 1958, you had invested with me $39,000?

A Yes...

Q Now what you are saying, then, is the line on the first page of Exhibit No. 1, (Ex 2358, the Deschenes prepared affidavit from which Alexander read the figures to Rebecca Tarlow, Vol. 20, 3/21/63, 136-137, when she testified in the U. S. District Court) which shows that you invested with me $12,500 in 1959, is incorrect?

A It really is...

Q Does that mean that $10,500 of that $12,500 was actually payable to you or had been actually invested by you with or through me before June, 1, 1959, or before January 1, 1959?

A Yes. Yes; yes, that is true; that is true.

Q How do you account for such a big error in Deposition Exhibit 1 (Ex 2358)?

A I don't know...

In preparing his net worth statement in my case Albert Deschenes had the benefit of two sets of records, Rebecca Tarlow's records and my records. He had my deposits in the bank (S-1) showing the $5000 July 13, 1956 check from Rebecca Tarlow as well as the $3000 March check for that year. Why did he ignore them along with Rebecca Tarlow's records and memoranda?

The memoranda along with the recorded mortgages show that my liabilities to Rebecca on December 31, 1958 were $39,000, $10,500 more than the figures he prepared for Rebecca Tarlow. Why that major discrepancy? The Government chose to ignore the fact rather than explain the discrepancies. It does not deny the truth of the subsequent testimony of Rebecca Tarlow but criticizes my technique in failing to apprehend its

preparation and adducing false testimony against me at an earlier stage. Somewhere in the law there is a principle that one may not profit by one's own wrong. Is it justice for the Government to say, "You should have caught that lie sooner?" For my inadequacy I apologize.

1. I apologize because I trusted the Government, as did Rebecca Tarlow when she testified that the figures as compiled by Albert Deschenes were correct.

2. I apologize for my prior inability to persuade Rebecca Tarlow to tell the truth after I discovered it until I cross examined her on June 25, 1964 in the case in which she sued me.

3. I apologize for the trial court's also trusting Deschenes and the figures he compiled for Rebecca Tarlow's affidavit.

4. I apologize for the prosecution's zeal in trying to keep the Court from considering the truth as it must now know it.

In Coleman v. Alabama, 377 U.S. 129, 130, (1964) the United States Supreme Court said:

page 130 The State answers that the claim comes too late, that it has been asserted for the first time by a motion for new trial. Admittedly, the point was not raised until the filing of the motion for new trial...but the trial judge permitted the petitioner to proceed on his motion. However, the judge sustained objection to all questions concerning the alleged jury discrimination and denied the motion.

page 133 ...this Court must reverse on the ground that the petitioner offered to introduce witnesses to prove the allegations and the court declined to hear any evidence upon the

DURESS IN OBTAINING STATEMENTS

BY INTERNAL REVENUE SERVICE

Melvin Davis

Vol. 2, 2/15/63 pages 1-26

page 17

Q (By Alexander) You went over your statement, didn't you sir, that you made? ...

A That is what I would love very much to bring out.

Q Well, let me ask you if your signature appears on that statement, sir?

A It does, under protest.

A (page 19) ... at the time that I signed that I told him that he wrote down what I did not say, and that if he pulled me on to a witness stand that I was not going to hold with all the stuff he put in there, because I did not say it. I gave him an answer and he put down more than my answer, and I told him that at the time, and I have my wife and two adult children there at the time. He insisted that I sign it or he would take me to jail.

Q (page 24) By Mr. Lenske; Mr. Davis, Mr. Alexander asked you whether your wife was available...Is your wife available?

A My wife is here.

Q Was she present at the time this statement was made up.

A She was. I brought her for that specific reason...

Q Well, if Mr. Alexander, wishes, would she be available to testify at this time regarding what happened at the time this conversation took place?

A Yes.

MR. ALEXANDER (Page 26) If your Honor please, the Government

preparation and adducing false testimony against me at an earlier stage. Somewhere in the law there is a principle that one may not profit by one's own wrong. Is it justice for the Government to say, "You should have caught that lie sooner?" For my inadequacy I apologize.

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A My wife is here.

Q Was she present at the time this statement was made up.

A She was. I brought her for that specific reason...

Q Well, if Mr. Alexander, wishes, would she be available o testify at this time regarding what happened at the time his conversation took place?

Yes.

MR. ALEXANDER (Page 26) If your Honor please, the Government

can now state we don't want to call Mrs. Davis as a witness in this case or anyone else in connection with something like this.

Jake Preuit

Vol. 4, 2/25/63, pages 12 to 41

Q (By Mr. Lenske) (page 38) Mr. Preuit, on August 17, 1960, at Sun Valley, Idaho, did you have a conversation with Albert P. Deschenes?

A He asked me ... And he had me sign those papers.

Q Were there any threats made to you at that time?

A He said, "Sign these papers or go across the street to jail"...

Q (By Mr. Alexander, page 40) ...And did I tell you to answer the questions honestly, that this is all that we wanted

A Yes, sir.

Eleanor Bertrand, Rebecca Tarlow and others were not alone in either signing false affidavits prepared and induced by the Internal Revenue Service or in signing affidavits under the unlawful threat of being taken to jail by the agent if they did not.

The court's erroneous assumptions of material facts stemming from prejudice. See my Opening Brief, 20448, page 41. Somewhere, not in the record, Judge Carter presumed that I was unwilling to give straight answers to ownership of properties in issue.

Vol. 60, August 13, 1965, page 62.

THE COURT: Well, I asked you one time to tell me what property you owned and what property you didn't own, and I got one of these "yes and no" or "I don't quite know" answers. If you wanted mt to go through all these transactions and so forth, you couldn't even then tell me what property you owned and which property you didn't.

MR. LENSKE: I'm glad Your Honor repeated that error. ...Perhaps Your Honor will correct that error. But Your Honor was wrong about that. I am positive that the record will bear me out... The specific ones that came up, which Your Honor were asking, I didn't say yes or no in the manner Your Honor said. I did say I could and would tell of each one as to the specific ones, when I was on the stand. The answer was I didn't own it or I did own it, and that was the truth... I didn't own it then and I don't own it today (This last item referred to the Madelyn (Pavia)(Ryland) Cox property, f 43, Ex 195)

The prejudice was present long ago. Mr. Burdelltried to correct it without success on April 22, 1964, when he said,

Vol. 59, page 2792:

"I may say that it was not my understanding that the defendant refused to disclose his ownership of any properties, if, as and when asked."

On each piece of property that I was asked about I g straight answers. Following are illustrations and the recc shows no instance where I did not give straight answers to questions put to me.

Vol. 47, 7/15/63, 928

Q. (By Alexander) Well, sir, you are familiar with Lot 116, aren't you?

A. Yes

Q. And it is your testimony that that property bel to Mr. Pierce?

A. Yes.

Vol. 47 7/15/63 956

Q. (Alexander) Well, on this particular property, 2711 S.E. 125th, did you put Mr. Pierce's name down on that

A. No, I didn't. That wasn't being in trust for hi

Q. Wasn't that his property?

A. No.

Q. Or your property?

A. No, it was mine. I bought it and it was purcha I recall, in my name, and I bought it with the view that it be useable by him for the extension of his trailer court.

960

Q. Are you saying that you didn't own 6628 Southeast 43rd at the time?

A. Yes, I say that I didn't.

962

Q. THE COURT: If you didn't own it, who owned it? In whose name did you have it?

A. It is not that I had it in the name of anybody else, Your Honor. This was a Madeline Ryland.

MR. ALEXANDER: Cox.

THE WITNESS: She was the owner of the property. She was purchasing it on contract...and the contract of purchase was assigned to Kenneth Armstrong whose money I put up for the purpose.

THE COURT: Then the Vendee's contract was in the name of Kenneth Armstrong?

THE WITNESS: Yes, it was assigned to Kenneth Armstrong.

THE COURT: You put the money up for him?

THE WITNESS: Yes.

The agreement showing that the assignment to Kenneth Armstrong was security for a loan to Joseph and Madelyn Ryland is set out in the 22d-23d pages of the Madelyn Cox testimony on this brief, designated as Government Sponsored False Testimony Madelyn C. (Pavia) Ryland) Cox.

CROSS EXAMINATION OF DESCHENES SHOULD HAVE BEEN ALLOWED ME BECAUSE:

1. He had filed an affidavit in opposition to my motion for new trial.

2. The deposition taken of his testimony in my civil suit against him was introduced in evidence in this case.

3. He was responsible for a doctored memorandum which related to important evidence in the trial.

4. His testimony in the deposition was in a material respect the antithesis of what he swore to in the case.

5. The test of his verity was important not only as to his deposition testimony and most recent affidavit but as to the whole prosecution since his testimony was a sine qua non for the whole case.

In opposition to my motion for new trial Deschenes' affidavit was filed (CR 48). He said, of the documents displayed to him by Brady on November 10, 1960, that "for the most part" related to years subsequent to the years under investigation.

This leaves the remainder not included in "the most part" as instruments within the "years under investigation."

The Government's brief, bottom of page 8 says:

"None of the documents were...used by the Government for leads, or in any other way (Nyman, Ex. A. Dep. p. 35; Deschenes Affidavit, R. 49; Deschenes Dep., Ex. E).

This is stated as a categorical, final fact. I did not and do not accept these conclusions as true. Since 1776 and certainly since 1887 we have not operated under the doctrine that "The king has spoken, long live the king". What the prosecution says, what its witness says is not, constitutionally, the final word until, at the least, the witness' statements are tested by cross-examination.

I shall give one additional illustration why the Government's key witnesses' ex parte statements under oath may not be taken as the final truth. A key item in the case was exhibit 2184. Inthe civil case I attempted to examine Deschenes about his wrongful seizure of that document. He produced a doctored copy of a memorandum which purported to include a notation of the date when the original of ex 2184 was handed to him. (I claim this was false and that no file was ever handed to Deschenes that included the original of ex 2184).

On page 87 (CR) appears a photostatic copy of that memorandum page, which relates to the "Nevens Gift Certificate", which is exhibit 2184, F.35. I claim that I can prove by cross-examination of Deschenes that the last sentence commencing withthe word "Note:" on CR 87 was added at a subsequent time to cover the method and time when the original was stolen from my files by the Internal Revenue Service to use it as evidence against me.

I claim that perusal of that sentence in relation to the rest of that page and all of the remaining 69 pages shows in its fac

that that sentence was added at a later time. Deschenes testified (CR 86) that, of the documents of mine that he took surreptitiously from my files and office building for photosti this is the only one as to which he can given the date of taki because of this memorandum that he made. See Deschenes depos Ex E.

The same Deschenes testified in the case on April 3, 1 Vol 28 as follows to my question:

Q. I wish you would tell the jury whether or not you made an entry in your log of the taking from my office,...did you make any entry of any kind in these exhibits about the taking of any papers from my office or building?

A. Well, if you have reference to this gift tax certi I have no notation in my files. I couldn't even tell you wh date it occurred.

I have already pointed out in my brief that Deschenes prepared and introduced Ex 820 and 820 First Amended, which net worth statement upon which the court accepted in its find the conclusions of Deschenes excepting only those specifically disproved by the defense. Deschenes' testimony and verity i sine qua non of the judgment against me.

Here is clear evidence of memorandum doctoring and fa testimony by a key witness on a key item on a key issue in t Should there be any doubt that the denial of the right to cr

examine such Government sine qua non witness is a denial of due process and a clear abuse of discretion if such a right were discretionary?

The prosecution presupposes that cross examination would not elicit additional falsities from Brady, Nyman and Deschenes that would materially affect my defense. Pages six through nine of the Government brief set forth numerous facts as though they were final. I contest most of these "final facts" and I am confident many will be disproved on cross examination.

As to the micro-film, there is inconsistency between Brady and Deschenes as to the source of the micro-film, see difference between the testimony of Deschenes in Ex E and the testimony of Brady in Ex C.

To require another of proof of what one expects to prove on cross examination of an adverse witness is in itself an abuse of discretion. It enables a false witness to prepare further falsity; it places a burden on the examiner to relate to the court proof when the examiner can only guarantee hope of proof. Since the witnesses in this case were witnesses who, I claim, stole from me, and have already falsified in material matters, I should have been free to examine them without preconditions.

Deschenes and the Court used as an anchor a statement l
me which should have had no legal effect as an admission. Se
Specification of Error 3, at page 26, Opening Brief, 20448.

Deschenes used as an achor Ex 2372, Folder 513, which i
a statement I furnished the Government of all properties I own
or managed as of December 31, 1958. Many items were taken fr
that statement without corroboration in preparation of the ne
worth figures that the court accepted from Deschenes' testimo
and compilation. This was contrary to law.

ADMISSIONS

20 Am. Jur. Evidence, section 546 - "Admissions or declaratio
to be competent, must have been expressed in definite, certai
and unequivocal language."

5 Wigmor, Evidence (3 ed.) Section 1471 (b)

"The statement must also, conformably with the principles f
Testimonial Narration * * distinctly import the fact of which
it is offered as an assertion."

Conrad, "Modern Trial Evidence, section 458.

> Requirement of Certainty. "An admission should possess the same degree of certainty as would be required in the evidence which it represents * * .

Dempsey v. Meighen 90 N.W. 2d 178,184,Minn.1958.

184 "...for such a declaration to be admissible it should relate to a statement of the decedent which is definite, cert and unequivocal and distinctly import the fact of which it i as an assertion...

The statement is not unequivocal and does not distinctly import the fact for which it is asserted and was therefore p executed. Furthermore the statements contained in it requir explanation."

DEPRECIATION

ELMER KOLBERG'S TESTIMONY

The new evidence relating to the testimony of Elmer Kolberg was extremely important because one of the pegs on which the whole Government case rested was Elmer Kolberg's testimony. Since depreciation was a determinative factor on any deficiency and since only through Elmer Kolberg's testimony could the Government even contend that the Court's finding on depreciation has a base in the testimony, any new evidence relating to Elmer Kolberg's qualification to testify in my case was important and fundamental.

Since I had succeeded in learning about and obtaining the testimony of Elmer Kolberg in the later case with its disclosure of Government bias I made that testimony a part of my affidavit and subpoenaed Elmer Kolberg to testify in court on my hearing on the motion for new trial. The court refused to let me call him to the stand, although he had responded to my subpoena duces tecum. I shall now show how important his testimony was and how the law affects his testimony, both in relation to the court's refusal to let me call him to the stand as per Op br 20448, pages 13-14, and also in support of my Assignments of Error in depreciation on pages 4-20 of my brief in 19539.

AN EXPERT WITNESS, NO MATTER HOW QUALIFIED GENERALLY, DOES NOT ADDUCE CREDIBLE EVIDENCE IF HE DOES NOT HAVE SUFFICIENT FOUNDATION IN THE FACTS OF THE INSTANT CASE AND A JUDGMENT BASED ON SUCH EVIDENCE IS REVERSIBLE.

Lagge's Estate

Chester County Reports, Pennsylvania,

Vol. 3 page 28, 288 (1948)

"Although the matter was not referred to at oral argument or by paper-book, a question was raised by exception to a ruling at trial. We are of opinion that there was no error in the exclusion of the testimony offered by the petitioners in support of their allegatic of gross inadequacy of the sale price. Messrs. Barker and Rowe are real estate brokers who were called as expe by the petitioners. They had no knowledge of the condit of the building upon the real estate in 1944; and, at th time of their inspection and appraisal in 1947, they mad no inquiries in regard to any repairs or improvements or change of condition of the real estate made between the years 1944 and 1947, nor were any such visible or apparent to them. The petitioners called other witnesses to prov that repairs and improvements or other changes had been m during that period and thus to give to the expert witnes additional information upon which, together with their knowledge acquired by their inspection in 1947, they might predicate an opinion of the value of the real estate in 9 The testimony of these purported factual witnesses was so vague, indefinite and uncertain in regard to the repairs and improvements made that we are constrined to find the experts not qualified, by reason of their lack of knowled of the condition of the real estate in 1944, and, therefor incompetent to testify to the market value of the real es in that year."

City of Omaha v. Omaha Water Co.

30 U.S. 180 1910

The U.S. Supreme Court, distinguishing this case from Continental Ins. Co. v. Garrett, 60 CCA 395, 125 Fed. 589 said:

"The dispute concerned the thing which had been destroyed, the value of something which was not to be inspected and valued from observation, because it was no in existence. Evidence was therefore essential to show what had been destroyed as well as its value. The case is wholly unlike the one here presented."

Irion et al. v. Hyde et al.

105 Pac. 2d 666, 669, 670, 671

672, 674, 1940, Mont.

Plaintiffs sued defendant to enjoin them from maintaining dams alleged to interfere with plaintiffs' prior water rights. The trial court made findings in behalf of defendant and plaintiffs appealed. Reversed.

P. 669 "No competent evidence appears in the record as to the capacity of these holes, absolutely the only testimony offered being that of an electrical engineer who stated that he had taken up hydro-electric engineering and had had some experience in surveying land, measuring reservoirs and computing the volume and flow of water...

Obviously no one could merely look at 119 holes in the ground and pick out four... and credibly testify that their average capacity was even approximately that of the 119...Such testimony obviously constituted no evidence whatever of the contents of the pot holes.

P.670 IN OTHER WORDS, THERE WAS NO EVIDENCE WHATEVER GIVEN ON THE POINT EXCEPT OPINION TESTIMONY BASED UPON UTTERLY INADEQUATE PREMISES.

P.671

(13) An expert witness can given an opinion based upon facts previously testified to by him (State v. Megorden, 49 Or. 259, 88 P.306, 14 Ann. Cas. 130), but cannot be permitted to give an opinion or conclusion on facts known to him and not communicated to court or jury; he must, so far as possible, first detail the facts. State v. Simonis, 39 Or. 111, 65 P. 595; State v. McLennan, 82 Or. 621, 162 P. 828; State v. Willson, 116 Or. 615, 241 P. 843; Northwest States Utilities Co. Brouilette, 51 Wyo. 132, 65 P. 2d 223, 69 P. 2d 623.

In such cases not only the facts, but the conclusions to which they lead, may be testified to by qualified experts... the expert states the facts and gives his conclusion in the form of an opinion which may be accepted or rejected by the jury.

Georgia Power Company v. J.C. Livingston

103 Ga. App. 512, 119 S.E. 2d 802, 803 (1961)

The inadequacy of the testimony of Elmer Kolberg to send me to jail is succinctly stated by the Georgia Supreme Court in one clear and logical sentence:

P. 803 Syllabus by the Court:

> "A witness is not competent to give his opinion of the value of a house in which he had never been.

Perhaps Judge Carter should have taken a leaf from John F. Kennedy and the Bay of Pigs disaster when, as reported by Theodore C. Sorensen, in the August 10th, 1965 issue of Look magazine on page 50, where he quoted our late president as saying:

> "How could I have been so far off base? All my life I've known better than to depend on the experts. How could I have been so stupid, to let them go ahead?"

Agricultural Ins. Co. v. Biltz

64 P 2d 1042,1046 Nev. 1937

In this case it was held that, since the structure had been substantially destroyed, the arbitrators could not reach a sustainable award under a fire insurance policy unless there was evidence adduced of the condition of the structure before the fire.

> "The dispute concerned the thing which had been destroyed, the value of something which was not to be inspected and valued from observation because it was not in existence. Evidence was therefore essential to show what had been destroyed as well as its value."

The same rule would, of course, apply to the testimony of Elmer Kolberg of the value and economic life of all buildings which he could not inspect because they were no longer in existence

Continental Ins. Co. v. Garrett,

125 Fed. 589 CCA 6th, 1903 (Tenn.)

Fire insurance damage award by appraisers for $3,409.7.

Assured filed bill in equity claiming $5,000, amount of poliy.

District Court held award void and entered decree awarding $0(

Circuit court affirmed.

P.590 "and in case of depreciation of the property from us, age, condition, location or otherwise, a proper redct shall be made therefor."

Two of three appraisers reported:

"We have carefully examined the premises and remain of the property ....and have determined the sound al to be $3,409.72.

P.592

"In the present case the arbitrators were to ascertai and appraise the sound value of a brick dwelling whih had been so completely destroyed by fire as that sub stantially nothing remained of the woodwork, inside r out. The walls themselves were in part fallen. Thu a mere examination of the premises could not, on the evidence in this record, have informed them as to th character of the finishing of the interior work, and its condition before the fire. The appraisers were x- perienced contracting builders, but, without some evde how was it possible for them to know the sound value or the loss and damage.

Under such circumstances, appraisers should give notce to both parties of the time and place of hearing, an require evidence in respect of facts which they coul not otherwise know.

P. 593

In favor of an apparently just award, many presumptins may be indulged but ...if they undertook to appraise the

loss and damage resulting to the assured without other information as to character of the interior work than that to be derived from such a ruin as this was, they were equally neglectful of their duty, and exhibited an indifference to justice most culpable."

The colloquy on the offer of Kolberg 's testimony appears on page 78 of Volume 60 of the proceedings of August 13, 1965. I said:

> MR. LENSKE: ...I want to get his confirmation that he gave that testimony. I want to further show that the bulk of his income, with slight and rare exceptions is from testifying for Governmental bodies; by testifying and appraising values at less than what the property owners in numerous condemnation cases, or their respective witnesses testifies as to what the values are.
>
> THE COURT: Is there any objection to taking his testimony?
>
> MR. ALEXANDER: Yes, I do, Your Honor. That's hardly new testimony and new evidence.
>
> THE COURT: Objection sustained. You can go, Mr. Kolberg.

On the following three pages appear the proceedings relating to the Brady testimony and the court's peremptory admission of the deposition and my exception to it. These two pages are pages 80 and 81 of Vol. 60, 8/13/65 and on pages 82 through 97 set forth the offer of proof and the objections and the rulings of the court and I make them a part of this brief by reference. The court said on page 88:

THE COURT: I sustain the objection ----

On page 89 the court said:

THE COURT: We will attach the Nyman's deposition and file it as part of these proceedings. Was there a deposition taken of Mr. Deschenes also? MR. ALEXANDER: Yes, Your Honor. I will be happy to have that attached also. THE COURT: You may attach it also.

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Commencing page 80 of 8/13/65, 20448:

MR. LENSKE: Yes, that has been his method of making a livelihood for the past twenty -- ten years. I want to show to what extent he makes his livelihood that way, and to what the Internal Revenue Service knew that and participated with that it has been his practice to bring stolen documents to the Internal Revenue Service, as part of his service in that connection. In that connection, he brought to them somewhere around 250 documents which he stole from my files, which Mr. Deschenes, his superior, knew were stolen from my files.

I want to show that he is one of the sources -- this is one of the sources the Internal Revenue Service had in obtaining pertinent information relating to my transactions.

THE COURT: Any objection to taking that testimony?

MR. ALEXANDER: Yes, Your Honor. This is an allegation by the witness in his own deposition that he submitted. These statements are denied. Whether or not he is actually an informer of the Internal Revenue Service is really irrelevant and immaterial to this case. The only issue is whether or not the Revenue Service suggested the taking of these documents; that they told him to get them. There are depositions, which I submit should be made part of this record. The record shows, in effect, that he wasn't an agent of the Revenue Service; that he never talked to anybody; that he took the documentscompletely on his own; that he never discussed this case with the Internal Revenue Service or the United States Government until after November 10, 1960. That was after

the documents were taken.

There has been a failure by counsel to make any showing that Mr. Brady was told -----

THE COURT: Ojbection sustained. The deposition will be made a part of the trial for the purpose of this motion for a new trial. What do you want to prove ----

MR. LENSKE: May I take exception on that, Your Honor, on the basis that not all the factual situations have been disclosed by Mr. Brady in his deposition that I took of him. I have additional facts that I believe, in sitting before a judge, will be more apt to be less evasive, about which I will disclose, which have a direct bearing on the verity of the Government agent and the admissibility of any and all of the documents that were stoeln by the Government from me.

THE COURT: You knew all about this when you prepared your affidavits. I take it, everything you talk about is set forth in your affidavits.

MR. LENSKE: No, Your Honor, everything I have talked about is not in my affidavits, because there are additional facts which I didn't put in my affidavits, which I am satisfied I can secure from him alive.

The practice in this District and in the Washington District is to permit live testimony on motions for new trials, as well as evidence by affidavits.

THE COURT: Objection sustained. What do you want to prove by Mr. Nyman?

MR. LENSKE: I didn't hear you, Your Honor.

THE COURT: What do you want to prove by Mr. Nyman? Do you have an affidavit with respect to Mr. Nyman?

MR. LENSKE: Yes, I have, Your Honor. I have made an affidavit with relation to Mr. Nyman and Mr. Deschenes. They are both here in the Courtoom. I would ask the Court not to require me to disclose my examination of them in advance, because I believe what information I should obtain from them will be more cogent if it is gotten fresh without giving them warning as to the way I intend to ask them.

THE COURT: Do you want to make a showing as to what you would elicit from them?

MR. LENSKE, If I do that, I will disclose to them the nature of my examination of them. It will lessen the effectiveness of the testimony that I hope to be able to elicit from them.

THE COURT: I am not going to take any testimony unless you make proof on the record.

MR. LENSKE: I want to object to that requirement; but I have no choice but to comply with it. I believe in propr due in the status of my case that the Court should properly let me proceed with my testimony in my own way, rather than restrict me in a position where I cannot examine them without disclosing them what I want to examine them about.

The balance, from pages 83 to 89 of 8/13/65, 20448, is made a part of this brief by reference.

I DID NOT WAIVE THE WRONGFUL INTRODUCTION OF THE DEPOSITIONS. They were not submitted to me.

The Government says on page 10 in paragrap h II that the trial judge did not err in denying oral testimony on the taking of my documents by "an employee of the defendant." This again is asserted as a final fact. I believe that when the cross-examination is completed, as I trust this court will permit me, the final fact will be that the documents were stolem from me by employees of the Government and that Brady was one of them.

At the top of page 11 in paragraph A the prosecution says I have no standing to complain of undesignated portions of depositions admitted in their entirety as exhibits below, that I didn't object or designate portions of the depositions that were objectionnable.

The prosecution in a high handed manner, with the cooperation of the court, put into the record the depositions of Nyman, Deschenes and Brady: not a portion of them but the whole deposition The record shows that they were not submitted to me for inspection, they were not identified, they were put in as exhibits as though I were not present, as though the case were a tea party between the prosecution and the trial judge, as though I had accepted the judge' invitation to walk out before the commencement of the argument

on the motion for a new trial, as though I were not a participant in the hearing but the predestined victim to be ignored except for the punishment.

In the face of that kind of proceeding the prosecution, whose obligation it is to see that I get a fair hearing, even when the judge is indisposed to give me one, says that I waive (Ans br 16,17) any error in failing to preserve it for review. Were this an isolated instance it could be minimized. It was not isolated. The prosecution throughout acted in a manner to deprive me of due process. It refused to let me see statements it had from prospective witnesses whom it did not call to the stand. Perhaps I would have called them as witnesses if I had seen the statements. It presented an in camera brief to the first trial judge and never did reveal its contents to me. In one instancein open court Alexander said that he would rather give his reason for making his statement out of my presence. (Vol. 57, 8/15/63) A reading of the record will disclose throughout the trial a continuous flow of action, commencing with the subpoenaing witnesses and conducting rump grand jury sessions, non-reporting of the testimony of Nyman and Deschenes before the Grand Jury, sponsoring false testimony, use of stolen documents from me, and numerous other types of action calculated to convict, not to do justice. The culmination, to date, is the High handed prosecution-to-judge lumping of a number of book thickness depositions without exhibiting them to the man whom they want to put into jail on account of what's in them, and then telli

the victim he deserves their unlawful effect because he didn't examine them and pick out the unlawful portions.

Boiled down to simple terms, the prosecution and the trial judge tied my hands quickly and ran and now say that if I didn't like it, I should have struck back then and there.

The very last thing that occurred at the hearing is an illustration. See Vol. 60 8/13/65, page 139:

MR. ALEXANDER: Your Honor, may I ask one thing; there is one document that remains, that should be part of the record. I would like the agreements admitted so we will have all the matters in evidence.

THE COURT: It may be admitted.

MR. ALEXANDER: Thank you.

This demonstrates not merely discourtesy, but prejudice and disregard of my primary, simple and fundamental rights at a trial or hearing in a court of law.

Neither the prosecutor nor the Court was the least bit interested in showing them to me and give me an opportunity to object to them if I saw fit to do so. The depositions, as has been shown, were already in that category.

That agreement, I presume, is the one that Deschenes had in his possession when he swore in the affidavit filed about September 14, 1962 in which he said, CR 44, 19539, "I have no documents in my possession belonging to Mr. Lenske." Nyman made an identical affidavit, CR 46, 19539. The microfilm of about 250 pages of other documents of mine are in the same category. Yet, I was deprived of the right of cross examining these witnesses

Re Ans br 13 ARGUMENT

EXTRAORDINARY PRIVILEGES

The court granted me no extraordinary privileges and I asked for none. The court did adjourn the case for eleven da (7/29/63 1958-1607) and trial was resumed 8/15/63 and 8/16/63 on adjustments that my accountant had ascertained during the interim from my files and from exhibits that were introdu He followed the court's direction that photocopies of exhibit and the substance of proposed adjustments be furnished to the prosecution in advance. The reasons for this were twofold. My accountant had gotten into the case after the trial was substantially completed by the Government. He saw numerous probabilities of errors and omissions by the Government. He was right. He found a number of errors and omissions and furnished the prosecution with the necessary photocopies of th exhibits and the substance of the proposed adjustments. Many these were conceded by the prosecution. Most of them were adopted by the trial court.

THIS WAS NO PRIVILEGE TO THE DEFENDANT. It was a recognition of the faulty, maybe false job that was done by the Government in preparing its net worth. (The Government had not furnished me with any Bill of Particulars in advance or any exhibits to peruse before trial and the trial court had denied my motion for a Bill of Particulars.) Because of the

late entry of my accountant into the case the adjournment was allowed by the Court. The prosecution should apologize for the wrong job it had done rather than prate about extraordinary privileges given to me to correct some of its major errors.

I might point out here that one of the proposed adjustments that was not allowed was the Bertrand item of $3911.12 and that it was in this period that the $3911.12 check was found and produced by Eleanor Bertrand and that it was after she found that check and the photostatic copy was served on the prosecution that Deschen phoned Mrs. Bertrand long distance to express his displeasure.

The burden to follow up leads, the burden of proof beyond a reasonable doubt was on the Government, not on me, and my accountant simply made up for the failure of the Government to do either an honest or a competent job. As he later stated, it was evident to him that during that period he did not cover all the ground and there remained other adjustments that could likewise be ascertained.

MY CASE DIFFERS FROM ADJUDICATED CASES IN WHICH MOTIONS FOR NEW TRIAL WAS DENIED ON GROUNDS OF NEWLY DISCOVERED EVIDENCE.

In a number of such cases affidavits were obtained fr Government witnesses who had been accomplices or co-defendan and affidavits were impeached by counter-affidavits or other affidavits or by oral repudiation of the affidavits by the affiants themselves.

Not one of the affidavits of my affiants was contested by the Government, not one counter affidavit was filed (excep Deschenes, and I shall treat that later) not one recantation occurred. My motion was supported by material and authentic exhibits (See Bertrand and Tarlow). Moreover, a substantial basis for my motion restson the testimony of adverse witness taken under oath, in subsequent litigation, in most of which was an adverse party. See Tarlow, Deschenes, Nyman and Royal testimony. Kolberg's testimony was in subsequent litigation where he again testified for the Government.

In most of the denied motions the witnesses who subsequ reversed their testimony were persons of doubtful character t begin with. In my case the subsequent affidavits and testimo were given by responsible people and in many instances the incorrectness of the original testimony was directly attribut to the prosecution.

In most of the denied motions the trial court heard whatever testimony the moving party and the Government offered and made findings offact, which necessitated careful scrutiny of the issues. In mine the court made short shrift and neither verbally or in writing analyzed the newly discovered evidence. In the few instances that the court referred to previous testimony in the record, it made incorrect and unsupportable assumptions.

In most of such denied motions the newly discovered testimony was not subject to physical or other kinds of definite ascertainment. In my case they were, such as the Rebecca Tarlow $5000. check, the Eleanor Bertrand check stub and her original statement and my duplicate statement (both typing and handwriting of 1957 vintage).

In all of the denied motions that were sustained the appellate court could see from the record that the court had valid basis in the record for its assumptions upon which it based its conclusions. In my case three major assumptions expressed by the court at the hearing on August 13, 1965, were wrong assumpsions from the record. They are:

1. That the Nevens gift certificates would have given me substantially all of her property, whereas it was less than half.
2. That the $500 check of March 1963 was the only one I gave Mary Nevens, whereas I gave her numerous checks previously.
3. That I was equivocal in my answers as to ownership of property in issue, when the opposite was true.

These are major errors of fact in the record and played a major roll in the court's mind.

The inapplicability of many of the citations of the Government to my case is illustrated by its citation of Mald v. U.S., 325 F. 2d 295, 297, CA 9, 1963, in answer to the El Bertrand testimony and the $3911.12 check. (Ans.br. 24)

The court in that case says on page 297 of the opinio

> "Appellant presented his affidavit of Ramos in support of his action recanting much of what Ramos had testified to at the trial. However, at the hearing Ramos repudiate the affidavit and testified that the affidavit, in so far it was contrary to his testimony at the trial, was a fabri tion and not true. The district court believed this testi of Ramos in this last hearing."

The witness, Ramos, at the hearing, repudiated his affi and reaffirmed his original testimony. The court accepted th original testimony as reaffirmed in open court as against the intermittent affidavit.

In my case, Eleanor Bertrand repudiated the Government prepared and induced affidavit and reaffirmed her testimony, given in open court, as to the consideration for the $2500 mo and as to the consideration for the $3911.12 check. Hence th is no evidence to sustain the Government's denial of the redu in my net worth.

The Maldonado case is illustrative of the proper practi this circuit of permitting live testimony on motions for a ne Without such live testimony and without cross examination on Ramos' affidavit, the trial court may not have had the basis concluding that the affidavit was not correct and that the te given in court originally was correct.

THE PROSECUTION VIOLATED DUE PROCESS IN ATTEMPTING TO USE AGAINST ME STATEMENTS IN THE RECORD WHILE CONCEALING FROM ME AN IN CAMERA BRIEF THAT WAS SUBMITTED DURING THE TRIAL EVEN THOUGH IT WAS NOT SHOWN TO JUDGE CARTER.

Due Process is violated when the prosecution has submitted to the court a memorandum in camera and has refused to serve a copy of it on the defendant. This amounts to a secret communication to the court. That it was not used by Judge Carter is no answer. It may have contained information which I might have used before Judge Ross to effect a dismissal before his death. It may, and I am confident, does contain material which would be useable in my brief against the prosecution, such as to show a shift of positions from one interpretation to another of such items as depreciation and the different use of contract profits or interest, and other items. I believe that I can show from that in camera brief and shift in positions that I could not possibly be held guilty of using the same interpretation in my returns; or, that if the Government's first interpretation is taken, then my deficiencies would be eliminated.

So long as there remains a legal document, a memorandum, a brief undisclosed to the defendant that was disclosed to the Judge, the trial could not have been within the due process requirements.

It is no answer that the Judge was willing to accept a in camera brief. The proffer was wrong, the acceptance was wrong, two wrongs do not make a one-half right. It was abuse of process to proffer a secret document to the Judge, and until I am allowed to see that secret document , the case against me should either be dismissed or abate.

Everything I said is in the record, either on file or in the reporter's transcript. Not so as to the prosecution. There is a substantial body of what they said which is not in the record and which I cannot use against them.

The prosecution has attempted to use against me statemen in my brief and statementsI made orally to the court and even concessions made by my accountant or my co-counsel before the Court. All of my statements, written and oral, are a part of the viewable and reviewable record.

Not so the prosecution. One of its major statements to the court is not reviewable by the appellate court because it is keeping that statement secret and I am unable to assert the admissions or concessions that the prosecution made to the court and which should be at least as binding on it as it con that I am bound by the statements or concessions I have made.

This procedure by the prosecution is an abuse of proce and is a violation of due process and has inherent prejudice As the U.S. Supreme Court said in:

> Turner v. Louisiana, 379 U.S. 466, 470, 473, Jan. 18, 1965:

"The Louisiana Supreme Court said, 470:

> '...unless there is a showing of prejudice, a conviction will not be set aside...This court is inclined to look upon the practice with disapproval, however, because in such cases there may be prejudice of a kind exceedingly difficult to establish'.

To this Justice Stewart, at page 473, said:

"...it would be blinking at reality not to recognize the extreme prejudice inherent..."

DUE PROCESS - IN CAMERA BRIEF

4/22/64 Vol. 59, Page 2809

MR. LENSKE: I want to point out for the record some additional errors. I want to point out the unfair procedure which permeated this case by the prosectuion, and on that sco I would at this time call upon Mr. Alexander to provide the Court and mark and exhibit the in camera brief that Counsel had provided originally for Judge Ross...It affects some of th theories in the case, and I will show Your Honor how....

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THE COURT: Was there an in camera brief handed to Judg Ross which was not served upon the defendant?

MR. ALEXANDER: Your Honor, this came up before Judge R in the presence of the defendant. The Government asked that it be permitted to serve a trial brief on the Court and that the defendant be given the same privilege. Thedefendant said he wa to exchange brief, and the Government said they would not excha briefs but they would submit one and that the defense could sub one. Judge Ross said fin,e he would take trial briefs from bot parties. We submitted trial briefs....

THE COURT: Your offer is overruled. I don't want tohea any more about it. However, don't ever in my court serve me wit a trial brief without serving the defendant.....

The prosecution refers to its brief in 19539 in which it states on page 19 that "The defense admitted that the defendant had made the advances to Mrs. Bertrand reflected as an accounts receivable on the Government net worth (R.611)..."

The prosecution uses my brief as an admission on which it contends should and does stand in lieu of evidence.

If that is correct this means that everything I did, everything I said in court, everything I filed or presented to the court was open to the prosecution to be used against me.

This was not true of the prosecution. It filed with the court an in camera brief and that has never been revealed to me. I have been unable to get a look at it, I am unable to use the admissions that the prosecution made in it in lieu of evidence or as an admission of the result of the evidence.

Until that in camera brief is disclosed to me and until I am empowered to use admissions in it for my benefit I am being denied due process, I am being denied the equal protection of the law with that given the plaintiff in the case.

To this extent it makes no difference that Judge Carter has never seen it and hasnot used it. The essential fact is that I have not seen it, I was not given an opportunity to use it.

Since the court has based its finding and ruling on the constitutional question of violation of the Fourth and Fifth Amendments and what I contend was the stealing of my documents by Deschenes, Nyman and now also Brady, on Zap v. United States, 328 U.S. 624, I have read all U. S. Supreme Court decisions written in the past few years involving wrongful search and seizure. I found ten cases of reversal on certiorari due to violation of the Fourth Amendment. They are collated on the next page. I believe that by inference they reverse or modify the Zap case.

Also there are two important differences between the Zap case and mine. I did not waive the right of inspection by contract with the U. S. Navy and I therefore could make any restrictions I chose. I told Mr. Nyman the very first time he came in that I would not permit any of my records to go out of the office. (4/15/63, Vol. 36, 108). This was not denied by Mr. Nyman when he was asked about it on two differe occasions. The first was on March 27, 1963, Vol. 25, page 92 and the second was when I took his deposition in 1965, Ex A and B. I cannot give the exact page since I do not have a copy of the depositions and they are in San Francisco, I beli In both instances his answer was that he did not remember. This coupled with the surreptitiousness of the taking of the records should convince any reasonable mind that the agents were expressly forbidden to take any records out of the office

Deschenes said he didn't ask permission because of the time he had to wait for files but he admitted it would have only taken one minute to ask permission.

U. S. Supreme Court - Fourth Amendment

Convictions reversed by U. S. Supreme Court in less than two years, December 2, 1963 to October 18, 1965, for violation of Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Case, Citation	Opinion by Justice	Date Decided	Nature of Case
Fahy, v. Connecticut 375 U.S. 85.	Warren, C.J.	Dec.2.,1963	Wilfully injuring public property (Swastika case)
Preston, v. U.S., 376 U.S. 364	Black	Mar.23,1964	Conspiracy to rob bank
Stove v. California 376 U.S. 483	Stewart	Mar.31,1964	Armed robbery
Massiah v. U.S., 377 U.S. 201	Stewart	May 18,1964	Narcotics
Aguilar v. Texas 378 U.S. 108	Goldberg	June 15, 1964	Narcotics
Beck v. Ohio 379 U.S. 89	Stewart	Nov. 23, 1964	Poss. of clearing house slips
Henry v. Mississippi 379 U.S. 443	Brennan	Jan.18,1965	Indecent proposal to girl
Stanford v. Texas, 379 U.S. 476	Stewart	Jan.18,1965	Poss. of Communist books
One 1958 Plymouth v. Pa. 380 U.S. 697	Goldberg	Apr. 29,1965	Forfeiture
*Griswold v. Conn. 381 U.S. 479	Douglas	June 7,1965	Contraceptive advic
James v. Louisiana 382 U.S. 36	Per Curiam	Oct. 18,1965	Narcotics

*This was not a direct search and seizure case but the opinion say on page 484 "The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

CONCLUSION AND MOTION

The United States Supreme Court said in Grunewald v. U. S., 353 U.S. 391, 423, on May 27, 1957:

> We are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as it does here we feel justified in exercising this court's supervisory control to pass on such a question.

My case is steeped in strong Fourth and Fifth Amendment constitutional and Bill of Rights issues of law and fact and I ask the appellate court to scrutinize both of them carefully and to analyze each of the issues I have raised carefully and fully, even though,I am sure, I have not presented them fully or adequately or in best briefing form. I have had to do my own work, including most of the typing myself, as I no longer have my faithful secretary. I did not complete my brief in 20448, although I believe no more than ten pages will cover the points and issues raised by the prosecution in its answering brief that I have not touched in this brief. With the exception of one or two items which are the same as in 19539 I have not covered the answering brief in the main case. I ask for an extension of time to do so, a limited time, such as two weeks from date of ruling; or, if the Court should see sufficient prima facie merit in my appeal in 20448, that it set that down for hearing immediately and extend the reply brief in 19539 till decision on 20448. The record in 20448 is much shorter and the issues much more limited. I have read rule 18 and have done the best I can to fulfill its requirements and shall ~~shall~~ do my best to make up a list of exhibits and comply otherwise.

Paul Leach